

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

ROBERT MOSS, ET AL.,)	
)	
Plaintiffs,)	7:09-1586
)	
-versus-)	February 9, 2011
)	
)	Greenville, SC
SPARTANBURG COUNTY SCHOOL)	
DISTRICT NO. 7,)	
Defendant.)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE HENRY M. HERLONG, JR.
SENIOR UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Plaintiffs:	AARON J. KOZLOSKI, ESQ. PO Box 11902 Columbia, SC 29211
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Karen E. Martin, RMR, CRR
US District Court
District of South Carolina

1 Wednesday, February 9, 2011

2 THE COURT: This matter's before the Court on
3 cross-motions for summary judgment. There are other
4 motions pending, too, but let me begin by asking, it
5 appears to me that the essential material facts are not in
6 dispute. Are they? I'll ask both sides that.

7 MR. KNIFFIN: We'd submit there are no real
8 factual issues.

9 MR. DALY: I would agree with that, Your Honor.

10 THE COURT: I was thinking so. So it's a matter
11 of law based on the facts that we have. There are some
12 Supreme Court cases that are fairly close on point to
13 support both sides really. The question, I guess, really
14 is whether the school district has exceeded what's allowed
15 in allowing these programs.

16 Let me just hear from the defendant school
17 district.

18 MR. KNIFFIN: I'm sorry. Your question, Your
19 Honor?

20 THE COURT: I just want to hear from you on why
21 you think you should get summary judgment.

22 MR. KNIFFIN: Sure.

23 THE COURT: And you may stand when you address
24 the Court.

25 MR. KNIFFIN: Thank you, Your Honor. With the

1 Court's permission I will start with an argument on the
2 merits of the district's summary judgment motion. The
3 district would submit that for two reasons the Court
4 should grant the district's motion for summary judgment.

5 First of all, the plaintiffs have failed to
6 distinguish the facts of this case and to take it outside
7 the realm of a typical release-time case. And secondly,
8 once this is recognized as a release-time case, that the
9 analysis is straightforward.

10 **THE COURT:** What you are saying is the Supreme
11 Court has approved certain release-time programs.

12 **MR. KNIFFIN:** Correct, Your Honor. That the
13 accommodations that the school district has made in this
14 case are in some regards different than the accommodations
15 that have been made in other cases but that doesn't mean
16 it should be treated any differently. And, therefore, the
17 analysis under the Lemon test, under the recent Fourth
18 Circuit case of Glassman and under other Fourth Circuit
19 cases is Ehlers-Renzi and Smith v. Smith go right to the
20 Lemon test. And we believe that under that test the
21 school district's actions and its policy have not violated
22 the purpose prong, the effects prong and certainly there
23 is no entanglement.

24 **THE COURT:** Well, you said there is no
25 entanglement. They argue that you are giving credit for

1 religious education. And I believe they argue, too, that
2 the school district adopted a policy of accepting credits
3 from private schools. Are they alleging all of the
4 private schools in Spartanburg or the surrounding area are
5 Christian schools?

6 **MR. KNIFFIN:** I'm not aware that plaintiffs have
7 made that representation. I believe they have represented
8 that most of the private schools in the area are
9 Christian.

10 **THE COURT:** But I believe the policy is not
11 designed to accept credit from only Christian schools, is
12 it?

13 **MR. KNIFFIN:** No, sir. The policy itself
14 anticipates that there will be any one of a number of
15 institutions that may seek to take advantage of the
16 district's release time policy. And as the district said
17 to both plaintiffs and plaintiff's counsel before they
18 filed their complaint, the district was open to a Jewish
19 release-time program or Muslim release-time program. So
20 this was not --

21 **THE COURT:** Is there a Muslim release-time
22 program?

23 **MR. KNIFFIN:** No.

24 **THE COURT:** But if there was, you would accept
25 it?

1 **MR. KNIFFIN:** Yes, Your Honor. For ten years
2 before this policy was adopted, since 1997, there's been
3 only one group in the community that has approached the
4 school district seeking opportunity to offer release time
5 and that is the same organization that approached the
6 school district and recommended this policy.

7 **THE COURT:** All right.

8 Let me hear from the plaintiffs then.

9 **MR. DALY:** May it please the Court? I'm George
10 Daly of the Charlotte, North Carolina Bar.

11 **THE COURT:** Glad to have you.

12 **MR. DALY:** Thank you. I appreciate the
13 opportunity to come and talk to the Court. I want to
14 start out by talking to you about the entanglement issue,
15 if I may. I think it's a clear basis for a decision --

16 **THE COURT:** Before we get there, why don't we
17 talk about standing. Don't you have a problem with
18 standing?

19 **MR. DALY:** I don't think I do, Your Honor.
20 There are two ways that the plaintiffs can get standing.
21 The first is by being parents of school children who are
22 subjected to the release-time program and children who are
23 subject to the release-time program. The Zorach case --

24 **THE COURT:** When you say subject to it, what do
25 you mean?

1 **MR. DALY:** I mean the child goes to a school
2 that has a release-time program.

3 **THE COURT:** Okay.

4 **MR. DALY:** And the Zorach case from 1952 in
5 Footnote 4 says, no problem of the court's jurisdiction,
6 where standing is jurisdictional, no problem of the
7 court's jurisdiction is posed in this case since, unlike
8 the Derimus case (phonetic), which was a taxpayer's case
9 --

10 **THE COURT:** And you have one plaintiff, I
11 believe, who is presently enrolled; is that right?

12 **MR. DALY:** One plaintiff's child is presently
13 enrolled and he is a senior. And the other plaintiff's
14 child was enrolled while she was a minor. She is now a
15 first-year college student.

16 **THE COURT:** Well, she's gone so she has no harm,
17 does she?

18 **MR. DALY:** Well, as the defendant's pointed out
19 to me, standing is determined as of the time you file the
20 complaint. And so she had standing then and she continues
21 to have standing. Her case is not moot because she's
22 asked for a dollar in exemplary damages.

23 **THE COURT:** Okay.

24 **MR. DALY:** The Zorach case says no problem of
25 the court's jurisdiction is posed because appellants are

1 parents of children currently attending school subject to
2 the release-time program. That fits our hand like a glove
3 as to all our individual plaintiffs. They are ripe within
4 the heartland of what's necessary --

5 **THE COURT:** I believe you alleged -- one thing I
6 was curious about, one of the things you allege from one
7 of the parents of one of the students was that the parent
8 thought the student who was attending there would feel --
9 she would have some type of bad feelings because of this
10 program or something.

11 **MR. DALY:** Yes. I think Mr. Moss alleged that
12 he felt his -- he had observed that his child was
13 disturbed by the fact of this program.

14 **THE COURT:** And I just get -- that piqued my
15 curiosity. How many -- approximately how many students
16 are presently in the release-time program?

17 **MR. DALY:** I think that -- I don't know
18 presently. I think there have been 20 or 25 in the course
19 of the last few years.

20 **THE COURT:** Twenty or 25. And how many students
21 were eligible for the program?

22 **MR. DALY:** Five hundred, I believe, more or
23 less.

24 **THE COURT:** Five hundred? So if she's one of
25 the 480 who don't participate, she feels bothered by the

1 fact that 20, over the years -- that's pretty much
2 stretching.

3 MR. DALY: 470 I would say as a matter of
4 arithmetic, Your Honor.

5 THE COURT: Well, I thought you said 20. That's
6 pretty much stretching the limit.

7 MR. DALY: Well, they clearly, we think, have
8 standing under the Zorach case. That was the same case.
9 It was children -- well, it didn't have the grade in it,
10 but as far as standing, it's the same case. Children were
11 being released to go to religious services. And the
12 Supreme Court unanimously said they are parents of
13 children currently attending schools subject to the
14 release-time program.

15 THE COURT: So here they are going for -- this
16 release-time program allows them to go for religious
17 instruction, do they not?

18 MR. DALY: Right.

19 THE COURT: Okay.

20 MR. DALY: May I just make one more point about
21 standing?

22 THE COURT: Sure.

23 MR. DALY: Alternatively, to the standing under
24 the Zorach case, we have standing as sort of people who
25 are affected and psychologically disturbed by this event.

1 And I would rely on the Suhre case, S-U-H-R-E, in the
2 Fourth Circuit.

3 **THE COURT:** And who is psychologically disturbed
4 by this program?

5 **MR. DALY:** Well, the parents and the children.
6 They have all made affidavits that it's a very bothersome
7 program to them. The daughter testified at great length
8 that it made her feel like an outsider.

9 **THE COURT:** That was what I was getting to.
10 She's an outsider and she's in the majority of 98 or
11 7 percent or something like that?

12 **MR. DALY:** Well, as far as students who don't
13 take release time, yes. But as far as being emotionally
14 offended by it, it's -- I don't think --

15 **THE COURT:** So she's -- and I'm not -- for the
16 purpose of this, it may be fine, but a few -- a handful of
17 students out of five hundred go for this program and she's
18 psychologically disturbed by it?

19 **MR. DALY:** There is a case in the Supreme Court
20 that's quite similar. It's cited in my brief called Santa
21 Fe Independent School District decided in 2000. And it's
22 a case about a policy down in Texas. And the application
23 of the policy, the policy concerned prayer at football
24 games. And there were a few students --

25 **THE COURT:** Oh, I don't doubt that. If I'm

1 attending a football game and I'm in the stands and
2 somebody says, let's all stand and we'll have a Christian
3 prayer, I don't want to hear it. But if I'm in a campus
4 of five hundred students and a handful leave at a certain
5 time of the day to leave school, I don't have to even know
6 about it.

7 **MR. DALY:** Well, she said one of them was her
8 friend and it affected her relationship with her friend.

9 **THE COURT:** Okay. And I imagine -- well, okay.
10 You know, I guess I'm getting off the point. I just find
11 that that's -- you know, I guess she could adopt a friend
12 who goes to church every Sunday and I guess that offends
13 her that her friend goes to church every Sunday.

14 **MR. DALY:** I understand there are always fights
15 about standing. But the Supreme Court in the Zorach case
16 said if you have got release time and you are a parent of
17 a student who is there, you've got standing.

18 **THE COURT:** Okay. Let's move on to the merits
19 of your claim then.

20 **MR. DALY:** All right. The clearest point of the
21 case, I think, is the entanglement, the third basis. And
22 this is an unusual case in many ways. Most Establishment
23 Clause cases you see involve the government intruding into
24 religion, putting up a Ten Commandments display on your
25 walls here or putting a creche out in front of the court.

1 **THE COURT:** Or a pageant or some Christian --

2 **MR. DALY:** Yeah. This is a different type of
3 case. This is where the gravamen of the complaint is that
4 the religious organization is intruding into the halls of
5 government.

6 **THE COURT:** Well, was it the Zorach case where
7 that was approved?

8 **MR. DALY:** Yes. It is clearly okay to have
9 release time. The reason this case is here is an elective
10 credit, which imports a grade, is given for it. If it
11 weren't for that, the case wouldn't have been brought,
12 obviously, because Zorach says release time is okay. The
13 Fourth Circuit, when it got hold of the Zorach case, they
14 didn't care for it too much. But they said they were
15 bound by it and they followed it in Smith against Smith.
16 So that's clear.

17 But in this case you've got a defendant
18 accepting an academic grade awarded by a religious
19 organization. I don't think there is any dispute about
20 that fact. And a high school grade is an important
21 discretionary governmental function. A high school grade
22 can make the difference between getting into college or
23 not getting into college.

24 **THE COURT:** Well, now, just on that point, isn't
25 the record fairly clear that -- I should ask it this way.

1 There is no evidence, is there, that there's an abuse of
2 the grading system, is there?

3 **MR. DALY:** Not with --

4 **THE COURT:** For instance, they don't just
5 automatically give A's to everybody. In fact, they have
6 had much lower grades, have they not?

7 **MR. DALY:** They have given some F's. This
8 particular release-time provider, SCBEST, we weren't
9 inquiring as to how they gave grades except as a potential
10 matter. And the grades that they gave appeared to be
11 across the spectrum.

12 There is an exhibit, I believe in the summary
13 judgment papers, that shows the grades that they gave at
14 another high school in Spartanburg called Dorman High
15 School. That was one of the early numbered exhibits in
16 the depositions and it shows some strikingly high grades.
17 I think that's in the record.

18 But the real issue is whether this is a
19 potential, whether they could give a grade to a student
20 who needed one credit to graduate and he was failing their
21 grade but for religious reasons --

22 **THE COURT:** Are you suggesting that there are no
23 decisions out of the Fourth Circuit or Supreme Court in
24 which the courts have authorized to accept credits from a
25 Christian school to a public school?

1 **MR. DALY:** That's correct, Your Honor. I think
2 this is quite an open issue in those forums.

3 **THE COURT:** Okay.

4 **MR. DALY:** What we rely on principally is the
5 Larkin case. And Larkin started out by quoting -- or
6 didn't start out, but its discussion of the third prong of
7 Lemon quotes -- yeah, the third prong of Lemon quotes from
8 the Lemon test. And it says, "Under our system, the
9 choice has been made that government is to be entirely
10 excluded from the area of religious instruction and
11 churches excluded from the affairs of government." And
12 they underlined that, churches excluded from the affairs
13 of government. And the Supreme Court doesn't underline
14 too much -- or they italicized actually. And here they
15 are italicizing a quote from one of their earlier cases.

16 Then it started talking about what the core
17 rationale of the Establishment Clause is and it drew those
18 same two distinctions. It quoted an old case that says,
19 "The structure of our government has, for the preservation
20 of civil liberty, rescued the temporal institutions from
21 religious interference." That's the same thing as
22 churches must be excluded from the affairs of government.
23 And it quoted an 1872 case which quoted an 1843 South
24 Carolina Court of Appeals case.

25 So this principle's been around a long time.

1 Government keeps out religion and religion keeps out of
2 government. This is the religion keeps out of government
3 case which is an unusual case. This meant that the
4 framers did not set up a system of government in which
5 important discretionary governmental powers would be
6 delegated to religious institutions. That's what they
7 have done here. They have delegated the power to give a
8 high school grade to a religious institution.

9 Now, that's the argument. It's very
10 straightforward and simple. You read the Larkin case and
11 it's right there.

12 Now, the defendant has three arguments that it
13 makes against that position. First, it says that we have
14 to show that the government is taking over church
15 functions. Well, we don't have to show that. We have the
16 church taking over government functions.

17 But they cite a Supreme Court case called the
18 Mueller case, M-U-E-L-L-E-R, against Allen from the 80's.
19 And they say that Mueller held that you need a
20 comprehensive, discriminating and continuing state
21 surveillance of religion for a challenged action to run
22 afoul of the entanglement problem. Well, when I read
23 that, I thought the Larkin case had been overruled.
24 Because if that were true, I would be in trouble.

25 But Mueller was a tax case. It's one of these

1 cases where the government is getting involved in
2 religion. They had a tax credit for giving books to
3 nonpublic school children, many of which were parochial
4 school children, but they only gave secular books. So the
5 government had to decide what's a secular book and what's
6 a religious book. And the Supreme Court said you are
7 getting too much into the business of religion. That's
8 not this kind of case. We say that religion is getting
9 too much into the business of government. So that case
10 has very little, if anything, to do with what we are at
11 here.

12 Then they say, well, everybody's doing it.
13 School districts all over the United States accept these
14 credits. If you rule in the plaintiff's favor, you are
15 going to be upsetting a nationwide apple cart and the
16 apples are going to be hard to deal with. Well, there is
17 not any proof of that.

18 I take that back, one little piece of proof I
19 will tell you about. They have a footnote in Docket 84 at
20 Note 14. And they say there is a lot of testimony that
21 these sorts of courses get accepted for credit. And I
22 looked at all those things they cite. And they all talk
23 about giving credit for religion courses.

24 Now, there are two kinds of religion courses you
25 have got to talk about. One is what SCBEST is teaching

1 where, according to their letter, they teach you to live
2 as a Christian would live. Basically, as the policy says,
3 it is for religious instruction. We are going to instruct
4 you how to be --

5 **THE COURT:** Christianity.

6 **MR. DALY:** Yeah. There is another type of
7 religion course which I refer to as, you know, the
8 influence of the Bible on Shakespeare. And you can teach
9 that over at Spartanburg High School. And it would be a
10 real interesting course because you really can't
11 understand much about, particularly Southern literature,
12 you can't read Faulkner unless you know what the Bible's
13 about. You can't read it with much understanding.

14 None of their proof tells you which of these
15 types of cases they are talking about. So there is not
16 any proof that the Christianity type of case is being
17 brought in except there is one affidavit by a man named
18 Mr. Wolfe who is the Guidance Director at Spartanburg.
19 And he says we got in a transcript on -- from a transfer
20 student. And it showed that this transfer student had
21 taken a religious instruction course in South Carolina
22 which, of course, is not any news because the state
23 statute allows it. But outside that one case in South
24 Carolina, there is no proof that you are dealing with any
25 kind of nationwide problem. It may well be that the only

1 thing that transfers is the Bible and Shakespeare.

2 **THE COURT:** Well, that's not really an issue
3 anyway unless courts have approved it. And then there is
4 argument if the courts have approved it, then that is
5 something to consider. And it depends on what courts
6 approved it.

7 **MR. DALY:** You are quite correct. There is no
8 authority on the issue.

9 **THE COURT:** Okay.

10 **MR. DALY:** The third objection that they have to
11 the entanglement issue, the third Lemon issue, is the case
12 out of the Tenth Circuit called Lanner against Wimmer.
13 It's a little hard to pronounce. Lanner against Wimmer.
14 And that case is discussed extensively in our briefs. I'm
15 not going to repeat my discussion there but I want to say
16 a few things about it.

17 Number one, it was decided before Larkin. And
18 it does not anticipate the Larkin analysis that what we
19 are dealing with here is churches moving into government.
20 And it just gets very confused. It has a very long dictum
21 about what you can do to accept grades from religious
22 schools. And for that dictum, it relies on a Supreme
23 Court case which I have cited called Board of Education
24 against Allen.

25 What Allen dealt with is the proposition that

1 the state can go over to the religious school and tell
2 them to do certain things certain ways. They can tell
3 them to hire a competent teacher for reading, writing and
4 arithmetic because parents have a constitutional right to
5 send their children to private schools including religious
6 schools. That's the Pierce against Society of Sisters
7 case.

8 But the state has a right to enforce its
9 interests in secular education, whatever that means. But,
10 clearly, it means reading, writing and arithmetic. So
11 they can require that the parochial school teach Calculus
12 I, for example. Well, the Lanner court flips that on its
13 head and says what they can do to check out the secular
14 religion over there, they can also do toward the religious
15 religion. And they say that the state can inquire into
16 the training of teachers.

17 Well, clearly, the state, if the parochial
18 school is teaching a course called How to Become a Priest,
19 and they have a priest teaching it, the state can't go
20 over there and tell them you can't have this course taught
21 with a priest. That's interfering with their religion.

22 They also say that they can determine, that is,
23 the government can determine whether a particular course
24 covered a subject for which credit could be given. That
25 seems to me like they may be saying we'll only accept

1 credit for Shakespeare and religion.

2 So the Lanner case, it looks good when you first
3 read it. But it's a very long dictum and it's based upon
4 a misunderstanding of the relationship of the state being
5 able to tell the religious school what it can do when it
6 teaches secular subjects but not be able to tell it what
7 it can do when it teaches religious subjects.

8 **THE COURT:** All right.

9 Let me hear your response.

10 **MR. KNIFFIN:** Thank you, Your Honor. I guess
11 the first --

12 **THE COURT:** Let's talk about standing. You
13 agree the Larkin case says in the footnote if you have a
14 student there, that gives you standing?

15 **MR. KNIFFIN:** No, Your Honor. The Zorach case
16 that plaintiff's cite --

17 **THE COURT:** Zorach case?

18 **MR. KNIFFIN:** The Zorach case was decided, it
19 came to the Supreme Court through the New York courts and
20 it was on the pleadings. And the plaintiffs had alleged
21 that their students had been coerced by the program at
22 issue. So the issue before the Supreme Court there, it
23 was not like here, where the plaintiffs were claiming
24 standing, merely the fact that they were in the same
25 school building with other students who were taking

1 advantage of a program of released time. They were
2 talking about -- the allegations were that these students
3 had been coerced. And that is not the situation.

4 In this case, Plaintiff Melissa Moss said that
5 her only interaction with the released-time course was she
6 was sitting in class and she oversaw a friend's syllabus
7 of the course. She did say in her deposition that she
8 felt more distant from her friend after she realized that
9 he was taking the course. But it wasn't because of
10 anything the friend had done. And also it didn't have
11 anything to do with --

12 **THE COURT:** Do you have to be offended or can't
13 just a student that's there say I'm part of this school
14 and this school has this program and I object to it?

15 **MR. KNIFFIN:** There is no case that has granted
16 either parents of students or students themselves standing
17 on that basis.

18 **THE COURT:** All right.

19 **MR. KNIFFIN:** Melissa Moss said that she felt
20 uncomfortable, a little different about this student only
21 because of the lawsuit. She thought maybe this student
22 would find out about the lawsuit and think differently
23 about her. It wasn't that she felt differently about this
24 student or felt differently about the school because this
25 friend of hers who continued to be a friend of hers was

1 taking this release-time course.

2 **THE COURT:** Plaintiff's attorney represents to
3 the Court that there has never been court approval of a
4 public school accepting credits from a religious school.

5 **MR. KNIFFIN:** We do not have a case that has
6 held that. But I would submit, Your Honor, it is an
7 exceedingly common practice. And there is a lot of things
8 that are so exceedingly common that courts just simply
9 have never had the occasion to rule on them. That doesn't
10 mean it's really a question of unconstitutional.
11 Certainly in this case there is plenty of testimony that
12 students transferred regularly from Oakbrook Preparatory
13 School to public schools throughout the area. And there
14 has never been a problem of those students receiving
15 credit for their secular courses or for their religion
16 courses. And furthermore --

17 **THE COURT:** So what you are saying is that this
18 release time accepting credits is nothing different than
19 having someone gone to a public school and transferring --

20 **MR. KNIFFIN:** From a private school to a public
21 school, Your Honor.

22 **THE COURT:** -- from a private school to a public
23 school.

24 **MR. KNIFFIN:** The only other federal case that
25 has discussed elective credit for release time is the

1 Lanner case from the Tenth Circuit. In that opinion, six
2 times in the opinion the Tenth Circuit compared elective
3 credit for release time to students transferring from
4 private religious schools to public schools. It's an apt
5 comparison.

6 And the biggest -- I think perhaps the biggest
7 obstacle of the plaintiff's case is what their argument
8 really is that two rights make it wrong. It's okay to
9 have release time. Release time is constitutional.
10 Plaintiff's counsel has recognized that even though his
11 plaintiffs -- his clients don't like it.

12 And furthermore, it is uncontroversial that
13 students have for decades transferred from private schools
14 to public schools. And where those schools are
15 accredited, what happens at Spartanburg High School and at
16 any high school, they look at the transcript. The
17 transcript comes from an accredited school. The school
18 district recognizes those credits. And what the
19 plaintiffs are somehow alleging is that when these two
20 things are done at the same time, all of the sudden it
21 becomes unconstitutional. Both of them are -- there's
22 substantial evidence in the record that this is something
23 that Oakbrook is familiar with and other school districts
24 in the area are familiar with.

25 **THE COURT:** Does the record reflect how many

1 students are in -- the defendant is Spartanburg County
2 School District No. 7. How many high school students
3 there are in the --

4 MR. KNIFFIN: Yes, Your Honor, one moment. I'm
5 looking to the declaration.

6 THE COURT: Not that it matters that much. I'm
7 just curious.

8 MR. KNIFFIN: Approximately 20 students have
9 received credit. This is from January 2007 to the
10 present. And of those students, there have been more F's,
11 D's and C's than there have been A's.

12 THE COURT: My question was how many students
13 are there, high school students are there in Spartanburg
14 County School District No. 7, approximately?

15 MR. KNIFFIN: About five hundred in the class.

16 THE COURT: He thought it was five hundred. All
17 right.

18 MR. RASSBACH: Your Honor, if I could just add,
19 Eric Rassbach for defendant. I think you had a
20 denominator in the discussion with plaintiff's counsel a
21 little bit wrong in that the 20 students is over several
22 years. So we are talking about --

23 THE COURT: I understand. He said since '07
24 till, so approximately three years.

25 MR. RASSBACH: So 20 students out of 2,000, not

1 five hundred, so something along those lines. So it is an
2 even smaller percentage of kids who are doing this. And
3 if anything, they are the outsiders, not Ms. Moss.

4 **THE COURT:** Okay.

5 **MR. KNIFFIN:** Your Honor, in other release-time
6 cases, cases that have taken place in elementary schools
7 where courts have recognized that students are more
8 impressionable, courts have approved release-time programs
9 where a vast majority of students have taken release time.

10 In Pierce, a Second Circuit case, the
11 allegations were that participating student were harassing
12 non-participating students. The court approved release
13 time in that situation. So for the plaintiffs to allege
14 they have been made to feel an outsider under these facts,
15 it's really thin skinned compared to other release-time
16 cases.

17 **THE COURT:** All right.

18 Just briefly, Mr. Daly, on the situation that he
19 raises. What's the difference in a student receiving a
20 credit for a release-time program to go into his or her
21 transcript, what's the difference -- why would there be a
22 difference in that compared to a student who transfers
23 over, say, in the 10th grade and has been totally in a
24 Christian school and the school district accepting those
25 credits which have been earned in the Christian school?

1 **MR. DALY:** Well, several answers. Number one,
2 the case you pose is not the case here. Number two --

3 **THE COURT:** What do you mean it is not the case
4 here? Doesn't the record reflect that Spartanburg 7
5 accepts transfers from and the courts have approved
6 transfers from Christian schools?

7 **MR. DALY:** No. There is -- well, Spartanburg 7
8 takes the position that if you are from an accredited
9 school, they'll accept you. Yes, they do that. The
10 record, there's no --

11 **THE COURT:** You say the difference is this
12 program here that you are complaining about is not from an
13 accredited school.

14 **MR. DALY:** Right. And --

15 **THE COURT:** Well, if it was accredited, then it
16 would be okay?

17 **MR. DALY:** No, we don't say that.

18 **THE COURT:** Well, why -- what's the difference
19 if a student has gone kindergarten through 10, 10th grade
20 in high school, total Christian school, and then says I
21 want to go to Spartanburg 7. And they send the
22 transcripts over. Spartanburg County School District --
23 Spartanburg School District 7 reviews the transcript and
24 says, okay, we'll accept you and you'll now be in the 11th
25 grade?

1 **MR. DALY:** Well, the difference is the parents
2 elected through grades 1 through 10 to send that child to
3 a private, separate school --

4 **THE COURT:** Right.

5 **MR. DALY:** -- which they have a constitutional
6 right to do.

7 **THE COURT:** Okay.

8 **MR. DALY:** In our case, the parents elected to
9 send their children to the public school. And the public
10 school in advance decides to allow them to go out one
11 course a day and get a grade --

12 **THE COURT:** Well, it's a dual consent, is it
13 not? The school district allows it under this program you
14 are complaining about --

15 **MR. DALY:** Right.

16 **THE COURT:** -- but the parent has to say I want
17 my child to go for that program.

18 **MR. DALY:** That's right.

19 **THE COURT:** So the school district is not
20 sending them over there without the consent of the parent.

21 **MR. DALY:** No, but the school district is
22 allowing it. Whereas, in the case of the parochial school
23 or the religious school, the school district doesn't have
24 any say about it. The constitution allows it. But these
25 parents have decided to bring their children into public

1 schools.

2 **THE COURT:** I find it -- I do find that argument
3 to be -- it's hard for me at this point to see any
4 difference in that.

5 **MR. DALY:** Well, even if you don't see any
6 difference in it, that doesn't mean that both sides of it
7 are constitutional. We would say that both are
8 unconstitutional.

9 **THE COURT:** I thought you conceded, excuse me
10 for interrupting. I thought you conceded that when a
11 child had gone to a parochial school and transfers over,
12 it is constitutional for that public school to accept
13 those credits earned.

14 **MR. DALY:** No. Pardon me if I have made that
15 concession. I did not intend to.

16 **THE COURT:** Haven't the courts upheld that?

17 **MR. DALY:** No. As far as I know there are not
18 any cases on that. I would concede that reading, writing
19 and arithmetic must be accepted. But if you have a child
20 who's been in a religious school for ten years, he's taken
21 reading, writing, arithmetic and prayer, practice of
22 prayer, and two-thirds of his grades are in the three R's
23 and one-third are in the practice of prayer, we do not
24 think that the public school can give him the A-plus that
25 the prayer leader gives him.

1 **THE COURT:** Well, that's a fine distinction. I
2 understand that. So in other words, if they were
3 substituting, say, the Story of Jesus for some other
4 social and giving credit for it --

5 **MR. DALY:** Right.

6 **THE COURT:** -- you would allege that --

7 **MR. DALY:** If they were teaching Shakespeare's
8 influence on the Bible or vice versa, we have no problem.

9 **THE COURT:** All right. I appreciate that.

10 **MR. KNIFFIN:** Your Honor, if a student is at
11 Oakbrook -- well, first of all, Oakbrook has been clear
12 that there is no difference from their perspective between
13 the religion course that was taught by SCBEST and the
14 religion course they teach their students. That the
15 religion course --

16 **THE COURT:** Well, as Mr. Daly argues, he said it
17 would be unconstitutional. Does District 7 accept credits
18 earned for pure religious instruction, credits given at
19 the parochial school?

20 **MR. KNIFFIN:** When a student comes to District 7
21 and presents transcripts from an accredited school, the
22 school district accepts those credits at face value.

23 **THE COURT:** I know. That's not my question. My
24 question is do you ever give credit for credits earned for
25 pure religious instruction?

1 **MR. KNIFFIN:** Well, the court said in Lanner it
2 would be inappropriate for a school district to look at
3 proposed credit for a release-time class and to decide
4 whether or not there was too much religious content to it.
5 That was specifically what the Tenth Circuit said.

6 **THE COURT:** Let's just go back to my question.

7 **MR. KNIFFIN:** I'm sorry, Your Honor.

8 **THE COURT:** And I'm sure this happens all the
9 time. I don't know how often it happens, but someone has
10 been in a parochial school in Spartanburg. And then they
11 decide to go to the public schools and they are in
12 District 7. I guess my question is, and you might not
13 know the answer to this, have there been any credits for
14 pure religious instruction that you have accepted in lieu
15 of credits that you had earned in the public school?

16 **MR. KNIFFIN:** Well, credits are -- would not
17 be -- those would come in as elective credits.

18 **THE COURT:** And excuse me. As counsel for
19 plaintiff's argue, they would have no objection to the
20 basics of reading, writing and arithmetic, those kinds of
21 things, English, those types of things. But, for
22 instance, do you ever accept a credit for a grade that was
23 given in, say, for instance, something like the Story of
24 Jesus?

25 **MR. KNIFFIN:** Well, the school district would

1 not inquire as to the religious content of the course. So
2 I guess if the question is if something that appeared on
3 the transcript that appeared to be religious, the school
4 has never denied a credit simply because the description
5 of a course in a transcript appeared to be religious.

6 **THE COURT:** And they don't inquire to that?

7 **MR. KNIFFIN:** No, Your Honor. If the student
8 was at Oakbrook and finished eight semesters, they would
9 receive a high school diploma from the state, approved by
10 the State of South Carolina. They graduated from high
11 school.

12 So the question is if someone with one semester
13 left in high school then decides they have to transfer,
14 their father loses their job or something like that,
15 transfers to a public school, why should that student be
16 penalized and lose credit for all those religious courses?
17 Why should the public schools serve as function to sort of
18 scrub out all religious courses and say these credits have
19 not really been received?

20 **THE COURT:** Well, we don't know what they are
21 giving credit for. But here, you must agree that this
22 release-time program, they are going over there not to
23 learn -- not to be taught math or reading or arithmetic.

24 **MR. KNIFFIN:** Sure.

25 **THE COURT:** They are going over there to get

1 religious instruction.

2 MR. KNIFFIN: Yes, Your Honor. It is a course
3 in religious instruction. But it is one that meets
4 pedagogical standards of Oakbrook and one that meets the
5 pedagogical standards of Oakbrook's accrediting agency.
6 So it is not like this is just a Bible study or something
7 like that. This is an academic course.

8 THE COURT: All right. I appreciate the
9 argument. I will take this under advisement.

10 Yes, sir?

11 MR. DALY: If the Court please, may I say
12 something else about this?

13 THE COURT: Sure.

14 MR. DALY: We are not interested in any post de
15 facto relief. I think that's the way to say it. We are
16 not interested in undoing what's been done. He talks
17 about some student --

18 THE COURT: You want to stop it from going
19 forward.

20 MR. DALY: We want to stop it from going
21 forward.

22 THE COURT: I understood that.

23 MR. DALY: All right. Thank you.

24 THE COURT: Yes, sir?

25 MR. RASSBACH: Your Honor, I just wanted to add

1 one point with respect to the entanglement argument that
2 plaintiff's counsel made. He's just wrong that the
3 entanglement prong can go both ways; that is, we look at
4 whether government is sort of intensively surveying
5 religion. That's what the entanglement prong is about and
6 that's what we argued in our briefs. But it doesn't go
7 the other way.

8 **THE COURT:** He said that's what his case is all
9 about.

10 **MR. RASSBACH:** Right. And that's where I think
11 he loses because you have to have state action. It has to
12 be a state actor doing something in order to violate the
13 Establishment Clause. Religious groups can go and survey
14 and intensively engage with public entities as much as
15 they want to. They have a First Amendment right to do
16 that. It doesn't really -- you can't look at and analyze
17 the entanglement prong of the establishment --

18 **THE COURT:** Wait a minute. Let's say that they
19 show up at the school and they knock on the door to the
20 principal's office and say we'd like ten minutes of time
21 when there is -- when everybody is in the auditorium and
22 we want to teach a little religion here. They have a
23 right to ask but the school, they don't have a right to do
24 that.

25 **MR. RASSBACH:** Right, exactly. And I agree that

1 they can't, you know, have a sermon time or what have you
2 during school assembly. And certainly, that's not the
3 school district's position. But you can't shift the focus
4 from what are the religious people doing. You have to
5 look very precisely at what it is that the government is
6 doing? And the problem in the cases you are talking about
7 is what the government officials decided to do in response
8 to that request.

9 So you can't -- you know, he was talking about
10 what happened at some other high school that's not with
11 respect to this private SCBEST organization. It is
12 completely irrelevant to this case. The only thing that
13 matters in this case is what exactly Spartanburg School
14 District No. 7 did.

15 **THE COURT:** What you are saying is when the
16 Court looks at entanglement, it has to look at what the
17 school is -- the public school is doing.

18 **MR. RASSBACH:** Right. That's the only way you
19 can violate the Establishment Clause is by state action.
20 And that's how they can only get relief under Section
21 1983.

22 **THE COURT:** I don't know about the state action
23 of you giving credits to -- for religious instruction.

24 **MR. RASSBACH:** That's the issue. But then you
25 don't actually have entanglement because the school

1 district is very carefully -- the Oakbrook relationship
2 actually helps the school district's position. It doesn't
3 hurt it. Because they have actually really tried to do
4 this in a way that doesn't entangle them. You look at the
5 entanglement standard. You look at what the school
6 district actually did and --

7 **THE COURT:** But you have no court cases which
8 have authorized the approval of the state, the school
9 district giving credit for religious instruction.

10 **MR. RASSBACH:** I think that the transfer
11 regulations under the South Carolina law would actually
12 push you in that direction. And, frankly, this has not
13 been --

14 **THE COURT:** Well, the statute -- I'm not
15 criticizing the state just because the state passed a
16 statute, that's what this is.

17 **MR. RASSBACH:** I certainly agree. I sue states
18 all the time. So I definitely agree with that.

19 What I'm saying is that you can't -- this has
20 actually not been a live issue in this case. We'd be
21 happy to give the Court some post-argument briefing about
22 the issue of just the issue of whether, say, somebody goes
23 from Oakbrook over to Spartanburg High School, the one
24 semester left, that sort of issue of --

25 **THE COURT:** My question was the court -- you

1 don't have any authority where the courts have approved
2 accepting a credit for religious instruction?

3 MR. RASSBACH: I don't have it right now but --

4 THE COURT: On a religious subject. I should
5 say it that way, just on a pure religious subject.

6 MR. RASSBACH: I don't have any right now but I
7 would -- this was not an issue in any of the briefing,
8 particularly down to that level.

9 THE COURT: I will give everyone until Friday if
10 they want to submit anything in addition.

11 MR. RASSBACH: Okay.

12 THE COURT: Thank you. Appreciate it.

13 MR. DALY: Judge, do we need to come to the
14 calendar call on Monday?

15 THE COURT: No, you do not.

16 MR. DALY: Do you want us to continue with the
17 pretrial schedule?

18 THE COURT: Yes, I'm going to rule on this as
19 soon as I can. It's before the Court on summary judgment,
20 cross-motions for summary judgment. And everyone -- and
21 you have already agreed that the facts are not in dispute.

22 MR. DALY: Right.

23 MR. RASSBACH: I think we still have some
24 deadlines about exhibits and things like that that would
25 be moving towards a bench trial.

1 THE COURT: You can just hold that in abeyance.

2 MR. RASSBACH: All right.

3 MR. DALY: Thank you.

4 THE COURT: Well, we don't need a trial.

5 MR. DALY: Right.

6 THE COURT: Why would we need a trial if you
7 agree on the facts?

8 MR. RASSBACH: Right. We have a scheduling
9 order that says that --

10 THE COURT: You are okay on that. Thank you.

11 MR. KNIFFIN: Thank you, Your Honor.

12 MR. DALY: Thank you, Judge.

13 ***

14 I certify that the foregoing is a correct transcript from
15 the record of proceedings in the above-entitled matter.

16

17 s/Karen E. Martin

2/10/2011

18 _____
Karen E. Martin, RMR, CRR

Date _____

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